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No. 83-1669

In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS JAMES SINITO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under double jeopardy principles, petitioner's prosecution for RICO conspiracy with predicate offenses of murder, gambling and obstruction of justice is barred by his earlier conviction for RICO conspiracy involving loansharking activities as the predicate offenses.

2. Whether RICO conspiracy is a lesser included offense of engaging in a continuing criminal enterprise where some of the acts underlying the RICO conspiracy charge involve drug trafficking.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A51) is reported at 723 F.2d 1250. The opinion of the district court (Pet. App. A52-A64) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1983. A petition for rehearing was denied on February 8, 1984 (Pet. App. A1). The petition for a writ of certiorari was filed on April 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In a 70-count indictment filed in the United States District Court for the Northern District of Ohio, petitioner and five others were charged with conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO)

statute, in violation of 18 U.S.C. 1962(d) (count 1); participating in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (count 2); travel in interstate commerce to facilitate an unlawful drug business, in violation of 18 U.S.C. 1952 (counts 3-23); possession of controlled substances with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (counts 24-39); and use of a telephone to facilitate illegal drug trafficking, in violation of 21 U.S.C. 843 (counts 40-70). Prior to trial petitioner filed a motion to dismiss counts 1 and 2 of the indictment on double jeopardy grounds. Petitioner alleged that his prosecution on the RICO conspiracy count is barred by a prior conviction for RICO conspiracy. He also claimed that the RICO conspiracy alleged in count 1 is a lesser included offense of the continuing criminal enterprise charge alleged in count 2, and that, consequently, the previous RICO conspiracy conviction bars prosecution on count 2 as well as count 1. Following a hearing, the district court denied the motion (Pet. App. A52-A64). On petitioner's interlocutory appeal (see *Abney* v. *United States*, 431 U.S. 651 (1977)), the court of appeals affirmed (Pet. App. A2-A51).

1. The first indictment (CR 81-58) was filed on April 10, 1981, and charged petitioner and his cousin Charles Sinito with RICO conspiracy, the object substantive RICO offense, conspiracy to make extortionate credit transactions, use of extortionate means to collect extensions of credit, and, as to petitioner alone, tax evasion. The enterprise charged in this indictment was the Appliance Mart, an Ohio corporation that allegedly was used as a front for carrying out the predicate acts underlying the RICO conspiracy and substantive charges; the predicate acts all involved violations of the federal loansharking laws, 18 U.S.C. 892 and 894. The indictment identified 12 victims of the loansharking practices and alleged that the criminal conduct had been committed between March 1, 1974, and

January 30, 1979. David Perrier, deceased at the time of the indictment, was named as the sole unindicted conspirator. After a jury trial, petitioner was convicted on the RICO conspiracy and substantive counts, the tax evasion counts, and some of the extortionate credit transaction counts. The court of appeals affirmed without opinion. See *United States* v. *Sinito*, 709 F.2d 1511 (6th Cir. 1983) (table).

The instant indictment (CR 82-119), which was filed on October 27, 1982, names six individuals, including petitioner, Angelo Lonardo,[1] Joseph Gallo, Frederick Graewe, Harmut Graewe, and Kevin McTaggart. Count 1 charges all but Lonardo with RICO conspiracy.[2] The enterprise identified in this indictment is an association in fact known by several names, including "the Cleveland Organized Crime Family," "the Outfit," "the Organization," or "the Mafia." The count charges a conspiracy to use the enterprise to facilitate illegal drug and gambling activities. The predicate acts described in count 1 include murder, illegal gambling activities and obstruction of justice.

Count 2 charges all six defendants (including Lonardo) with participating in a continuing criminal enterprise by acting in a supervisory capacity in the course of engaging in a continuing series of violations of federal drug laws from which they derived substantial income. This count charges, inter alia, that Lonardo was the de facto head of the enterprise; that an unindicted co-conspirator, Carmen Zagoria,

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[1]Lonardo's name was mentioned on several occasions during petitioner's trial on the prior indictment. Gerald Martin testified that petitioner had introduced him to Lonardo, who Martin had heard was an organized crime figure (7/17/81 Tr. 34-35). In addition, Harvey Rieger, who had borrowed money from petitioner that had been delivered by Lonardo, testified that he had been told by Martin that Lonardo was a "rackets figure in Cleveland" (7/21/81 Tr. 46-50).

[2]In the instant indictment, petitioner is accused of killing David Perrier, who was named as an unindicted co-conspirator in the first indictment.

directed its daily operations; and that petitioner and Gallo assisted by financing its operations, protecting it from encroachment, and passing along instructions from Lonardo to other members of the conspiracy. Both the RICO conspiracy and the continuing criminal enterprise are alleged to have begun in March 1978 and to have continued to the date of the indictment.

2. At the hearing on petitioner's motion to dismiss counts 1 and 2 of the instant indictment, the district court heard testimony from three government agents. Agent Herbert Cohrs had worked on the investigation that culminated in the loansharking indictment filed in April 1981. He also participated in the investigation of the second RICO conspiracy. Cohrs stated that the witnesses in the two cases were not the same (H. Tr. 11-15).[3] He acknowledged that he had read reports prepared by other agents indicating the existence of one massive criminal organization of which Lonardo was a member (H. Tr. 23-25). However, Cohrs stated that he learned only within the last year that petitioner also was a member of that organization (H. Tr. 28).[4]

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[3]Cohrs noted that several witnesses referred to Lonardo at petitioner's loansharking trial (see note 1, *supra*) and that the evidence showed that Lonardo provided the funds that petitioner loaned to Harvey Rieger. In addition, Cohrs stated that at that trial the government attempted to introduce into evidence checks executed by Carmen Zagoria, who is named as an unindicted co-conspirator in the instant indictment, and who is to be a principal government witness at the forthcoming trial. According to Cohrs, the government sought to introduce that evidence because Zagoria's name had been mentioned as a loansharking victim (H. Tr. 29-30).

[4]Cohrs testified that prior to the trial in the loansharking case, he came across an FBI report of a statement by government witness Harvey Rieger, who told the FBI that he believed that petitioner was involved in drug activity, particularly cocaine (H. Tr. 36, 39), and that Lonardo had been seen frequently at the Appliance Mart (the enterprise charged in the RICO-loansharking conspiracy) during 1974 (H. Tr

Agent Dean Winslow, who worked on the investigation leading to the instant indictment, testified that he had concluded from his investigation that there was a massive criminal conspiracy by a single organization to control various illegal rackets in Cleveland, including drugs, gambling, and loansharking (H. Tr. 68). He believed that Lonardo and petitioner were active in the loansharking aspect of that conspiracy (H. Tr. 71).[5]

Agent George Grotz, who supervised the Organized Crime Squad in the Cleveland office of the FBI from July 1979 to July 1981, also testified that, based upon FBI reports, he had concluded that there existed one organization in the Cleveland area devoted to controlling a number of illegal activities, including gambling, loansharking and drugs (H. Tr. 91-92). Grotz acknowledged that the investigation showed that the organization had committed other crimes, including murder, obstruction of justice, and bribery (H. Tr. 97-98).

37-38). Cohrs also stated that he had reviewed an affidavit for a warrant to search the Appliance Mart; the affiant stated that he had received information that two individuals, Daniel Greene and John Nardi, had been murdered because they tried to "muscle in on loansharking and gambling of the organization in Cleveland, Ohio" (H. Tr. 50). Cohrs testified that he had not been involved in the investigation leading up to a 1978 RICO conspiracy indictment, in which eight individuals, including petitioner and Lonardo, had been charged with engaging in loansharking, gambling, murder and other crimes (H. Tr. 21). The predicate acts specified in that indictment, which was eventually dismissed as to petitioner, included conspiracy to murder Nardi and Greene and the actual murder of Greene. Those acts are not set forth in the present indictment.

[5]When asked about the Zagoria checks proffered as evidence in the prior trial (see note 3, *supra*), Winslow stated that they would be offered in evidence at the trial on this indictment because the government had recently learned (as a result of Zagoria's decision to cooperate) that the checks were not drawn to cover a loan from petitioner, but were in payment for methaqualone tablets furnished by petitioner (H. Tr. 82-83).

3. At the conclusion of the hearing, the district court denied the motion to dismiss (Pet. App. A52-A64). Relying on the "totality of circumstances" test of *United States* v. *Jabara*, 644 F.2d 574 (6th Cir. 1981), and *United States* v. *Tercero*, 580 F.2d 312 (8th Cir. 1978), the court examined the extent to which the two conspiracies shared common elements, such as time span, identity of co-conspirators and the nature of the underlying criminal activity. Based on this analysis, the court concluded that the two RICO conspiracies are separate offenses for double jeopardy purposes (Pet. App. A55-A62). The court also held, in reliance on *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), that the RICO conspiracy charge in the instant indictment is not a lesser included offense of the continuing criminal enterprise charge; it thus rejected petitioner's claim that his prior conviction for RICO conspiracy bars his prosecution for participating in a continuing criminal enterprise (Pet. App. A62-A64).

The court of appeals affirmed (Pet. App. A2-A51). The court upheld the district court's reliance on, and application of, the "totality of circumstances" test (*id.* at A19-A32). Specifically, the court noted that there was only a ten-month overlap in the two conspiracy charges (*id.* at A22); that, with the exception of petitioner, there was no overlap of co-conspirators in the two indictments (*id.* at A23-A28);[6] and that the underlying statutory offenses are different (*id.* at A28-A30).[7]

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[6]The court of appeals rejected petitioner's argument that the references to Lonardo, Zagoria, and Perrier in both cases (see notes 1-3, 5, *supra*) are indicative of the existence of only one conspiracy (Pet. App. A23-A28). The court noted that, unlike other cases in which the personnel overlap was significant, any such overlap here is "minuscule" (*id.* at A27).

[7]The court of appeals noted that the FBI agents' "belief that they were investigating one massive conspiracy is not controlling" (Pet. App. A30).

In addition, the court of appeals held that even if prosecution of petitioner for RICO conspiracy is barred by his prior conviction for that offense, there is no bar to his prosecution for participating in a continuing criminal enterprise (Pet. App. A32-A48). Applying the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court concluded that the two offenses are separate for double jeopardy purposes.

ARGUMENT

Petitioner's double jeopardy claims, which relate to only two counts of a 70-count indictment, have been carefully examined and rejected by both courts below.[8] The thorough opinion of the court of appeals, on which we largely rely, is correct, does not conflict with the decisions of this Court or any other court of appeals, and does not otherwise warrant review.

1. Petitioner contends (Pet. 25-44) that, under double jeopardy principles, his present prosecution for RICO conspiracy with murder, gambling and obstruction of justice as alleged predicate acts, is barred by his prior conviction for RICO conspiracy involving loansharking activities. In rejecting this contention, the court of appeals recognized (Pet. App. A19) that, under *Braverman* v. *United States*, 317 U.S. 49 (1942), it is the agreement that forms the nucleus of a conspiracy offense. Accordingly, the determination "whether the government can prosecute on more than one conspiracy rests on whether there exists more than one agreement" (Pet. App. A19).

In answering this question, the court of appeals examined the totality of circumstances surrounding each prosecution. Specifically, the court focused on the following five factors: (1) the dates of each conspiracy, (2) the similarity of personnel involved in each offense, (3) differences in the statutory

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[8]We note that more than 19 months have elapsed since petitioner's indictment.

offenses charged in the indictments, (4) the overt acts that would demonstrate the nature and scope of each conspiracy, and (5) the places where each conspiracy was alleged to have occurred. The court's reliance on a "totality of circumstances" approach is consistent with the approach taken by other courts of appeals in this context. See Pet. App. A20 (citing cases). Moreover, the court eschewed a rigid application of the "totality of circumstances" approach. For example, it did not rely on simple comparisons between the allegations in the two indictments; instead, it conducted a broader inquiry into "whether the particular acts alleged in the indictment are part of a larger, unified conspiracy for which the defendant has already been prosecuted" (*id.* at A30).

Applying this approach to the instant case, the court of appeals concluded (Pet. App. A22-A32) that the two conspiracies were distinct in time, participants, and purpose. Although the court noted slight overlaps in time and personnel, it regarded these overlaps as insignificant and not indicative of a single conspiracy (*id.* at A22-A28). Moreover, the court pointed out that each RICO conspiracy involved a different enterprise and distinct overt acts (*id.* at A28-A30). In petitioner's prior prosecution, the enterprise was the Appliance Mart and the overt acts consisted exclusively of loansharking activities; in the instant prosecution, the enterprise is alleged to be a group of individuals associated in fact to commit illegal acts, and the overt acts are murder, gambling, drug trafficking, and obstruction of justice.

We note that petitioner does not advocate a different approach from that employed by the court of appeals. Instead, petitioner simply reviews the same factors considered by the court and quarrels with the manner in which

the court applied those factors to the facts of this case. Further review of this fact-bound claim is not warranted.[9]

2. Petitioner contends (Pet. 50-58) that his prosecution on count 2, for participating in a continuing criminal enterprise (21 U.S.C. 848), is also barred by his prior conviction for RICO conspiracy (18 U.S.C. 1962(d)).

First, as the court of appeals recognized (Pet. App. A32-A33), petitioner's argument can succeed only if his prosecution on count 1, for RICO conspiracy, is barred by double jeopardy. It is clear that if petitioner had not been charged with RICO conspiracy in the present indictment, he would have no colorable double jeopardy claim with respect to the Section 848 offense. The RICO conspiracy involving predicate acts of loansharking for which petitioner was previously convicted is entirely distinct, both in fact and law, from the continuing criminal enterprise involving drug offenses charged in count 2. Petitioner's claim rests on the theory that the earlier RICO conspiracy charge is subsumed

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[9]Although petitioner acknowledges that the courts below placed on the government the burden of establishing that the prosecutions involve separate conspiracies, he finds fault with the court's conclusion that the government successfully met that burden without calling its own witnesses (Pet. 44-50). The court of appeals correctly rejected this contention (Pet. App. A49-A51). There is no reason to require the government to present its own evidence where the evidence adduced by the defense is itself sufficient to warrant denial of the double jeopardy claim. See *United States* v. *Stricklin*, 591 F.2d 1112, 1119 (5th Cir.), cert. denied, 444 U.S. 963 (1979).

Petitioner notes (Pet. 46) that at least one circuit has indicated that it would place the burden on the defendant to show that the offenses are the same. *United States* v. *Martinez*, 562 F.2d 633, 638 (10th Cir. 1977). However, the fact that some other court has adopted a standard of review *less* favorable to petitioner provides no basis for considering whether the court that rejected petitioner's claim erred in its assignment of the burden of proof.

within the RICO conspiracy alleged in count 1 of the instant indictment and that the latter RICO conspiracy is, in turn, subsumed within count 2, the Section 848 offense. Because the courts below correctly concluded that petitioner may be prosecuted on the instant RICO conspiracy charge, his double jeopardy claim with respect to the continuing criminal enterprise charge fails.

In any event, the court of appeals correctly concluded (Pet. App. A34-A48) that each offense requires proof of a fact that the other does not (*Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)) and that, therefore, RICO conspiracy and continuing criminal enterprise are not the "same offense" for double jeopardy purposes. In order to convict petitioner of RICO conspiracy, the government must establish that he associated with an enterprise affecting interstate commerce and that he conspired to participate in the affairs of the enterprise through a pattern of racketeering activity (Pet. App. A38-A42). In order to convict petitioner of a Section 848 offense, the government must show that he engaged in a series of federal felony drug violations that were undertaken in concert with five or more persons with respect to whom he occupied a supervisory or managerial position and from which he obtained substantial income or other resources (Pet. App. A42-A45).

As the court of appeals stated in summarizing the differences between the two offenses (Pet. App. A45-A46):

> RICO encompasses any pattern of racketeering activity proscribed by 18 U.S.C. § 1961. Continuing Criminal Enterprise is limited solely to narcotics trafficking. RICO requires no minimum number of participants. A continuing criminal enterprise has an express requirement that at least five individuals be involved.

> RICO is not addressed to any specific level of organized crime figure. * * * In contrast, the object of the Continuing Criminal Enterprise statute or "Kingpin" statute is specifically aimed at upper level crime figures who occupy a position of control in the narcotics netherworld.
>
> Finally, RICO requires proof of an enterprise, whereas Continuing Criminal Enterprise, using the term in a different context, makes no such requirement of proof. Although defendant argues that the two statutes employ the term "enterprise" in the same context, we do not agree. In a substantive or conspiracy RICO prosecution, the government has the burden of showing the existence of an enterprise that affects interstate commerce. *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981). The enterprise is proven by the existence of a continuing organization and by evidence that members function as a continuing unit. *United States* v. *Phillips supra*, quoting *United States* v. *Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528, 69 L. Ed.2d 246 (1981). Moreover, the government must show where the enterprise was furthered through a pattern of racketeering activity. In contrast, § 848 merely requires proof that the defendant undertook a series of violations in concert or in conspiracy with five or more persons. The existence of an enterprise is not a required element. *United States* v. *Phillips*, 664 F.2d at 1013-14. Additionally, there is no requirement that the objective under § 848 be to further the group. The commission of the violations is sufficient.

The decision of the court of appeals on this issue is consistent with the decision of the only other court of appeals that has directly addressed the issue. *United States* v. *Phillips*, 664 F.2d 971, 1010-1014 (5th Cir. 1981), cert.

denied, 457 U.S. 1136 (1982). Accordingly, this issue does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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